No. 10,996

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

GEORGE KERR, *Appellant*,

vs.

P. J. SQUIER, Warden of the United States Penitentiary, McNeil Island, Washington, *Appellee*.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF FOR APPELLANT

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BRIEF FOR APPELLANT

STATEMENT OF THE CASE

This appeal is from the entry of an order of the United States District Court for the Western District of Washington, Southern Division, denying Appellant's petition for a Writ of Habeas Corpus (Tr. 23-24).

FACTS OF THE CASE

Appellant was indicted upon seven (7) counts of an indictment (Pet. Ex. 2) charging violations of the postal laws, pleaded guilty on Counts 2, 4, 5, 6 and 7; he was sentenced to imprisonment for ten (10) years on Count 2, five (5) years on each of Counts 4, 5 and

6, and two (2) years and a fine of $1,000.00 on Count 7, all sentences to run consecutively (Pet. Ex. 2).

Appellant concedes the validity of the sentence imposed on Counts Two, Four and Seven. It is his contention that the sentencing Court was without jurisdiction to impose sentence on him on Counts Five and Six, for the reason that said sentence placed him in double jeopardy by imposing double punishment, and is therefore void.

Count 2 charged a violation of Title 18, U.S.C.A., Section 320, namely, robbery of three certain registered mail bags from a named custodian of the same, at the Sacramento Post Office, California, February 9, 1933 (Pet. Ex. 2).

Counts 4, 5 and 6 charged a violation of Title 18, U.S.C.A., Sec. 317, namely, unlawfully, knowingly and feloniously stealing, taking and abstracting out of the Sacramento Post Office, California, the same three registered mail bags, each separately charged as an offense, as are referred to in Count 2, on the same date (Pet. Ex. 2).

Count 7 charged a violation of Title 18, U.S.C.A., Section 88, namely, a conspiracy to commit and the commission of certain acts aiding the commission of the acts complained of in the previous counts (Pet. Ex. 2).

The physical facts are not in dispute. The Appellant, in company with others, committed the crime of robbery of a custodian of mail matter at the time and place charged (Pet. Ex. 2). There was but one custodian, one Williams, a postal employee; but one

transaction, the taking of three registered, locked mail pouches from the said Williams, and that transaction was simultaneous and inclusive, all having occurred at the precise time and place charged in the indictments (Pet. Ex. 2). For this single transaction and simultaneous taking (Tr. 20-21), the Appellant received a sentence of ten years on Count Two, five years each on Counts Four, Five and Six for taking the said mail bags from the Post Office, and two years and a fine of $1,000.00 on Count 7 (Pet. Ex. 2).

ASSIGNMENTS OF ERROR

The errors assigned and relied upon on this appeal are:

1. The Court erred in holding that the allegations contained in said petition for a Writ of Habeas Corpus were insufficient in law to justify the granting of an order discharging the Appellant herein (Tr. 23-24).

2. The Court's Findings of Fact do not support the Court's Conclusions of Law (Tr. 21-23).

3. The Court's Findings of Fact (Tr. 17-21) are inconsistent with the Court's order denying Appellant's petition for discharge (Tr. 23-24).

4. The Court erred in denying the discharge of Appellant from custody (Tr. 23-24).

QUESTION

Did the trial court, after imposing sentence on Counts Two, Four and Seven, have the power to further impose sentence on Counts Five and Six? It is conceded that the sentences on Counts Two, Four and Seven were valid, in that each of said counts and sen-

tences thereon, although arising out of one transaction, denounces a different class of criminal act. The question here, however, goes to whether or not, the taking, being one transaction and simultaneous, and not selective, double punishment has been inflicted for one criminal act, to-wit: the larceny of three mail bags.

ARGUMENT

The fundamental concept underlying Appellant's appeal in the case at bar is an oft enunciated rule of law, stemming from the Fifth Amendment to the Constitution of the United States. The Appellant contends that his rights were infringed upon, and he has been subjected to double punishment by the imposition of the sentences on Counts Five and Six. Under the Fifth Amendment to the Constitution of the United States, the sentences were invalid and the Court, without jurisdiction to impose them, if they do so constitute double punishment.

> *Ex-parte Lagomarsino* (C.C.A. 9) 88 F.(2d) 86;
> *Pringle v. United States*, 128 F.(2d) 736;
> *Stevens v. McLaughry*, 207 Fed. 18.

In the case at bar, the District Court, after hearing evidence and argument of counsel, made and entered Findings of Fact (Tr. 18-21). Finding No. 5 (Tr. 20-21) clearly states that the taking of the three mail sacks, charged in Counts Four, Five and Six of the original indictment were "simultaneously taken and their taking involved but one transaction, and were all of the mail bags carried at that time by the said Walter E. Williams, custodian thereof, named in said indictments * * *." In view of this Finding, it is submitted that the case at bar comes precisely within the rule voiced by several recent decisions.

In *Ex-parte Lagomarsino* (*supra*) the Appellant was charged under an indictment containing five counts; Count One charged breaking and entering into a certain post office with intent to commit larceny;

Count Two charged that with intent to rob mail, defendant cut a certain mail pouch used for the conveyance of mail. Count Three charged the defendant did steal, take and abstract mail from said pouch. Count Four, also alleges stealing from the said mail depository, and Count Five was identical. The only distinction in Counts Three, Four and Five was that mail matter addressed to different persons were taken from the same depository. In that case, Lagomarsino conceded that the sentences on Counts One, Two and Three were valid, but contended that the sentences on Counts Four and Five were invalid, as being all part of one simultaneous transaction. The Court, in determination of this matter said:

> "The parcels charged to have been stolen under Counts 3, 4, and 5 are three separate articles and had a different addressee. It is conceded by the appellant that the taking might have been simultaneous and continuous.
>
> (2, 3) In *Braden v. U. S.* (C.C.A.) 270 F. 441, in which Judge Sanborn, later Justice of the Supreme Court, sat with the other Circuit Judges, it is said held that the larceny of four horses from a barn at the same time constituted but one offense. While every presumption must be indulged in favor of the judgment and sentence, *Hall v. Johnston, Warden* (C.C.A.) 86 F. (2d) 820, just decided, but where upon the face of the record it is disclosed that the offense charged involved several separate articles, not charged as separately taken, but which may have been simultaneous and continuously taken, a different relation obtains. Suppose a flock of sheep is stolen as one act. May the thief be punished for stealing each sheep simultaneously and con-

tinuously driven away? If a person kills a flock of sheep, unless under very peculiar circumstances, the killing of each sheep would be a separate act, as cutting separate mail bags. To take several letters from a mail depository simultaneously and continuously is one act and comprehends one intent.

This court held in *Parmagini v. U. S.*, 42 F. (2d) 721, that concealment and distribution of narcotics was a part of the indivisible acts of the offense of selling. That case, however, is distinguished from this in that the concealing and distributing were merely steps to the consummated act of selling. The acts charged in counts 3, 4, and 5 connote a simultaneous and continuous act, therefore, are indivisible parts of the act charged in count 3.

Appellee concedes that the sentences on Counts 1, 2, and 3 are valid, but contends that as to Counts 4 and 5 the sentences pronounced were void because the charges in said counts were indivisible parts of the offense charged in count 3, and having served the sentences on counts 1, 2 and 3, his further detention is unlawful. The District Court so held and ordered the defendant discharged. Affirmed."

In *Colson v. Johnston*, 35 F. Supp. 317, the defendant was charged under an indictment containing eleven counts. The first count charged assault on Post Office employees in charge of mail matter. The second count charged robbery of the said post office employees of a certain number of registered mail pouches. The remaining counts, No. 3 to 11 inclusive, contained the identical charges against the petitioner contained in the second count, save that in each latter

count reference was made to a different numbered mail pouch. All of the several mail pouches, however, referred to in Counts 2 to 11, formed a part of the mail matter which was taken in a single robbery upon which the charges in the indictment were based. The Court said as follows:

> "(1) It is the conclusion of this court that the sentences imposed on petitioner under these remaining counts are, and each of them is, invalid as being in excess of the power of the sentencing court; that such court, after having imposed a sentence of twenty-five years on the second count, reached the limit of its jurisdiction so far as its power to sentence petitioner for the offenses set forth in the indictment was concerned. This conclusion is based in turn on the determination of this court that although it contained eleven separate counts, the indictment against petitioner in fact stated but one offense carrying a maximum penalty of twenty-five years, namely robbery of mail matter from persons having custody thereof in the course of which the lives of such persons were placed in jeopardy by the use of dangerous weapons. And petitioner, having served the maximum sentence, is entitled to release from further custody. * * *
>
> "(4) Counts three to eleven, inclusive, charge the identical offense charged in count two and consequently the sentences imposed thereunder are void. What these remaining counts propose to do is to make as many separate acts of robbery out of what was in fact a single robbery as there were mail pouches taken in that one robbery. Section 197 of the Criminal Code (*supra*) does not authorize such an interpretation of its provisions. Further, the case of *Johnston v. Lago-*

marsino, 88 F. (2d) 186, of this Ninth Circuit, is authority for the proposition that a single theft cannot be split up into as many separate offenses of theft as there were articles taken in the theft.

"Petitioner has served his full sentence for the crime of robbery of mail matter from postal employees in charge thereof, whose lives were placed in jeopardy by the use of dangerous weapons in the course of the robbery. The later consecutive sentences imposed on him under the other counts of the indictment which were repetitious of the same offense of which he had served full time were in excess of the power of the court to impose and, therefore, illegal and void.

"(5) Wherefore, the writ of habeas corpus will be issued and the petitioner will be discharged;" * * *

While it is true that the decision of a District Court is not binding upon this Court, it is significant, however, that the facts in the *Colson* case are identical with the facts in the present appeal, and it is further significant that the U. S. District Attorney for the Northern District of California, Southern Division, did not see fit to appeal to the Circuit Court of Appeals. By inference, in *McKee v. Johnston*, 125 F.(2d) 282, this court, at page 383, has tacitly approved the ruling in the *Colson* case. At that time, this court, in distinguishing the *McKee* case then before the court, from the *Colson* case, stated:

"that the indictment referred to in *Colson v. Johnston, Warden* (D.C. Cal.) 35 F. Supp. 317, called to our attention by appellants as supporting their cause, did not charge the abstraction of letters, etc., from the mail bags stolen, but simply designated the theft of each bag under a separate count."

The most recent case pertinent to this issue is *Robinson v. United States* (C.C.A. 10), reported 143 F.(2d) 276. This case was decided on May 26, 1944, and a re-hearing denied July 17, 1944. In this case, the appellant, Robinson, was charged under two indictments. The court concluded that the sentence imposed upon the three counts contained in the second indictment were valid. The question which is apropos to the present inquiry arose, however, under the first indictment which contained four counts. The first count of that indictment charged a conspiracy. The second, third and fourth counts charged the defendant with transporting in interstate commerce from Texas to Oklahoma by means of a motor vehicle three different women for the immoral purpose of having the said women engage in the practice of prostitution. Each of the latter three counts were identical, except for the identity of the different women. The court in this matter delivered a rather exhaustive and searching opinion, which is peculiarly controlling and persuasive with reference to the instant cause.

> "The question remains whether counts two, three and four in No. 13,457 charge separate and distinct offenses. 18 U.S.C.A., Sec. 398, makes it an offense to transport in interstate commerce 'any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose.'
>
> "We think it is a fair inference that each of the women named in counts two, three, and four of No. 13,457 was transported at the same time and in the same automobile.
>
> "(2) The test for determining whether the of-

fenses charged in the several counts of the indictment are identical is whether the facts alleged in one, if offered in support of the others, would sustain a conviction. Where each count requires proof of a fact, which the others do not, the several offenses charged are not identical.

"It may be urged that in order to establish count two in No. 13,457, it was necessary to prove the transportation of the particular woman named therein and that she was transported for the purpose of prostitution, facts not required to be proven in order to establish either of the other two counts; that the same may be said with respect to counts three and four; and, hence, that each count required proof of facts which the others did not.

"(3) The same transaction may constitute separate and distinct crimes where it is susceptible of separation into parts, each of which in itself constitutes a completed offense. But the same evidence test must be applied with some discrimination. Merely because one element of a single criminal act embraces two persons or things, a prosecutor may not carve out two offenses by charging the several elements of the single offense in different counts and designating only one of the persons or things in one count and designating only the other person or thing in the other count.

"(4) Unlawful transportation is the gist of the offense. In order to come within the statute, it must be of a woman or girl and for one or more of the immoral purposes designated in the statute. Here, the transportation was a single continuous act and the offense was completed when the transportation crossed the state line. As to each woman the offense commenced and

ended simultaneously. There was not a series of steps, following one after the other, each of which constituted in itself a complete offense. We think an analogy may be drawn with larceny at common law. Larceny is the felonious taking by trespass and the carrying away of the personal property of another, without the latter's consent, and with the felonious intent permanently to deprive the owner of such property. If a person drove a vehicle to the barn of another and unlawfully and feloniously loaded into the vehicle 25 sacks of corn, which had been stored in the barn by the owner, and carried it away with the intent permanently to deprive the owner of the possession thereof, such person would be guilty of a single larceny, although he loaded each sack into the vehicle separately and had an unlawful intent as to each sack of corn. It would constitute a single offense, even though the corn taken belonged to different owners, because there would be one single act of taking and carrying away.

"And, by the weight of authority, where the same act or stroke results in the death of two persons, acquittal or conviction of the murder of one bars a subsequent prosecution for the killing of the other, because the killing is but one crime and cannot be divided. If a single act against two persons, where the offense is against the person, constitutes but one offense, it must be all the more true when, as here, the offense is not against the person, but consists in the unlawful transportation for one of the interdicted purposes, and there was but a single transportation.

"(5) We are of the opinion that the transportation here was a single, continuous act and constituted but one offense.

> It follows that counts two, three, and four of the indictment in No. 13,457 constituted but one offense, and the maximum sentence which could have been lawfully imposed under No. 13,457 was seven years, and the maximum sentence which could have been lawfully imposed under No. 13,528 was twelve years.
>
> "The order is reversed and the cause is remanded with instructions to vacate the sentences and impose new sentences within the limitations above indicated."

In light of the foregoing, it would seem that the appellant's position is unequivocally correct. However, counsel for the appellant is mindful of this court's ruling in the case of *Kerr v. Johnston*, 130 F.(2d) 637. The Appellant in that matter is the identical appellant herein and at first blush it would appear that the position of the appellant in this proceeding has previously been adjudicated.

A careful examination of that prior case will disclose that the point raised in that proceeding was definite and distinct from the present matter at issue. The present question was not even before the Court at that time. The Writ was then sought on the theory that the sentencing court was without jurisdiction to impose sentence on any counts other than Counts Two and Seven. An examination of the briefs in that matter filed herein as exhibits (Petitioner's One, Petitioner's Three, Petitioner's Four) disclose conclusively that appellant's then contention, which the District Circuit Courts resolved against him, was that since only one transaction occurred, he could not be sentenced for both robbery, under Title 18 U.S.C.A., Sec.

320, and larceny, under Title 18 U.S.C.A., Sec. 317. Indeed, Appellant was not then eligible to question the validity of sentence on Counts Five and Six, having at that time not served any time under Count Four of the indictment; *McNally v. Hill*, 293 U.S. 131. That being so, certainly the government could be in no better position than the Court. If the Appellant was not eligible to challenge the validity of Counts Five and Six, then the government could not ask for what would amount to a declaratory judgment as to their validity. In the government's brief, filed in that cause (Pet. Ex. 1) on p. 7 thereof, it is said, after setting forth the two pertinent statutes, being Sections 317 and 320 of Title 18 U.S.C.A.:

> "bearing in mind the two above quoted statutes, the only question that need now be decided is: Does Count 2 recite an offense separate and distinct from that recited in Count 4? Whether or not Counts 4, 5 and 6 recited but one offense and justified but one sentence, need not be decided, since on authority of *McNally v. Hill*, 293 U.S. (3), if the conviction and sentence on Count 4 was proper, Appellant cannot question his imprisonment until he has served the unexpired portion of the sentence on Count 4."

Again, in the brief of Appellant (Pet. Ex. 3) on p. 4 thereof, in a summary of the question to be then decided, it is said:

> "in short, were the acts complained of in Counts 4, 5 and 6, necessarily part of and included within the findings, alleged in Count Two so as to preclude separate punishment therefore."

The language of *Kerr v. Johnston* (*supra*), although not on its face conclusive, must accordingly be

read and interpreted in light of the foregoing. It is self evident that when the Court said, at p. 639

> "the evidence charged in Count Two was distinct from the evidence charged in Counts Four, Five and Six, *Schultz v. Hudspeth*, 10 Circ., 123 Fed. (2d) 729. The findings charged in Counts Four, Five and Six were distinct from each other. *McKee v. Johnston*, 9th Circ., 109 Fed. 2, p. 273, 275. Hence, the sentences imposed under Counts Four, Five and Six, as well as those imposed under Counts Two and Seven were valid."

The Court simply meant that Counts Four, Five and Six were all valid as to the particular question then before the Court; in short, the sentence on Count Two for robbery did not preclude the passing of a valid sentence for larceny under Title 18 U.S.C.A., Sec. 317.

As part of the sentence imposed on Count Seven of the indictment, the Court ordered the Appellant to pay a fine of $1,000.00. The Appellant, in his petition (Tr. 5) has alleged that he is a pauper or poor prisoner. In order for the Appellant to purge himself of the fine, he must show affiirmatively that he has served at least one month after completion of all valid terms of imprisonment. By the District Court's Findings of Fact No. 4 (Tr. 20) it is shown that he has so served, it is uncontroverted that he has been in continuous custody since 1934, that more than one month has elapsed since August 28, 1944, and that he is still in custody. It is the position of Appellant that under the provisions of Title 18 U.S.C.A., Sec. 641, which relates to the exoneration of poor prisoners from the payment of fines, that before he can invoke the jurisdiction of the appropriate U. S. Com-

missioner, this court must first adjudicate the question of whether or not he has completed service of terms of imprisonment imposed by the sentencing court on all valid sentences. Manifestly, the U. S. Commissioner does not have the jurisdiction to determine the validity of the detention of the Appellant, where such detention is under and by virtue of a judgment and commitment valid on its face. This view of the proper procedure is substantiated by the opinion in *Hogan v. Hill*, 9 F. Supp. 333, at p. 336, Paragraph 7, thereof. Under that holding, it would appear that the indicated method would be to invite this Court to determine the validity of the imposition of the sentence under which the Appellant is detained, and that if this court determines that the imposition of the sentences on Counts Five and Six was invalid, then, although the instant application for a Writ of Habeas Corpus must be denied, the cause may be remanded to the District Court, to permit the Appellant to make the appropriate showing before the U. S. Commissioner having jurisdiction. This is the procedure followed in *Hogan v. Hill* (*supra*).

CONCLUSION

It is axiomatic that each application for a Writ of Habeas Corpus is de novo and is therefore to be considered on its individual merits. It is submitted that the precise question presented by this appeal has not heretofore been determined, with respect to this individual Appellant.

The language of several of the cited cases, particularly that contained in *Colson v. Johnston* (*supra*), *Robinson v. United States* (*supra*) and *Ex-parte Lagarmarsino* (*supra*) is so apt, so in point, and so decisive of the issue herein that any argument evolved by the Appellant would be repetitious and fulsome. It is apparent that the Conclusions of Law (Tr. 21-22) and the order of the District Court (Tr. 23-24), cannot be supported by the Findings (Tr. 17-21), and that this Court should reverse the order of the District Court, subject to the Appellant's qualification as a pauper or poor prisoner, under Title 18 U.S.C.A., Sec. 641.

Respectfully submitted,

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